Supreme Court, U.S.
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No. 95-1219

In The

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE THIRD CIRCUIT COURT OF APPEALS HAVE ISSUED A PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT JUDGE REQUIRING HIM TO GRANT THE PETITIONER'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT WHERE SUCH ACTION WOULD DICTATE THE RESOLUTION OF FACTUAL FINDINGS COMMITTED TO THE DISTRICT JUDGE AND BE IN CONTRAVENTION OF THIS COURT'S PRIOR PRECEDENTS?

II. SHOULD THE THIRD CIRCUIT COURT OF APPEALS HAVE ISSUED A WRIT OF MANDAMUS TO THE DISTRICT JUDGE IN A LIMITATION OF LIABILITY ACTION DIRECTING HIM TO ADOPT THE JURY FINDINGS OF NEGLIGENCE AND UNSEAWORTHINESS FROM A SEPARATE ACTION IN STATE COURT AGAINST THE VESSEL OWNER AND IN FAVOR OF THE PETITIONER, WHERE THE PETITIONER HAD EXPRESSLY STIPULATED IN THE LIMITATION PROCEEDING AND IN ACCORDANCE WITH STANDARD ADMIRALTY PRACTICE THAT THE VESSEL OWNER COULD LITIGATE ALL ISSUES RELEVANT TO THAT PROCEEDING NOTWITHSTANDING ANY FINDING OR RULING IN THE STATE COURT ACTION?

RESPONDENT'S RULE 29.6 STATEMENT

There are no subsidiaries which are not wholly owned by Consolidation Coal Company. The following are parent companies of Consolidation Coal Company:

Rheinbraun US GmbH

Rheinbraun AG

RWE AG

DuPont Energy Company

E.I. du Pont de Nemours and Company

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Consolidation Coal Company ("Consolidation") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the United States Court of Appeals for the Third Circuit's denial of Petitioner's petition to that court for Writ of Mandamus and dismissal of Petitioner's appeal entered on November 29, 1995 (Pet. a1-a2) at Nos. 95-3479 and 95-3491, respectively, and the Third Circuit's denial of Petitioner's Petition for Rehearing entered on December 27, 1995 at those same numbers (Pet. a3).

STATEMENT OF THE CASE

Petitioner, filed an action against Consolidation in the Court of Common Pleas of Allegheny County, Pennsylvania at No. G.D. 90-00980 ("state court action") in January 1990. In his Complaint, Petitioner sought recovery for personal injuries that he allegedly sustained while in the employ of Consolidation pursuant to the Jones Act, 46 U.S.C. § 688, and the doctrine of unseaworthiness under the general maritime law.

On July 20, 1990, Consolidation commenced the within action in the United States District Court for the Western District of Pennsylvania seeking exoneration from or limitation of its liability with respect to Petitioner's state court action under the provisions of the Limitation of Liability Act, 46 U.S.C. § 181 *et seq*. *See* Pet. a14, entries 1-5. At the time of filing its Complaint, Consolidation deposited with the district court a bond in the amount of $120,000, in accordance with 46 U.S.C. § 185, representing the value of Consolidation's interest in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Petitioner claimed to have been working at the time of his accident.

Upon filing of Consolidation's Complaint and in order to protect the district court's admiralty jurisdiction over this matter, said court, through the Honorable Alan N. Bloch, entered an Order on July 20, 1990 (Appx. A) which, among other things, ordered on page 3 that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the

> aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability be and the same hereby are stayed and enjoined.

By its application, Judge Bloch's order specifically enjoined any further prosecution of the state court action which Petitioner had previously filed.

After the parties had proceeded with discovery in the present action for approximately six months, Petitioner, on January 18, 1991, filed with the district court a Motion to Vacate or Dissolve Injunction and to Stay (Pet. a46), requesting that the district court lift the stay that it had ordered on July 20, 1990 so as to allow Petitioner to pursue his Jones Act and unseaworthiness claims in the state court action. In so requesting the lifting of the court's stay, Petitioner agreed to stipulate that (1) the district court had sole and exclusive jurisdiction of all issues relating to Consolidation's attempt to limit its liability in the present action; (2) that no state court judgment would be *res judicata* as to any limitation fact or issue in the present proceeding; and (3) that Petitioner's action would be confined to the state court proceeding. *See* Pet. a47, ¶ 8.

Citing established admiralty practice, Consolidation opposed the sought lifting of the stay in the present action, contending that the stipulations offered by Petitioner were insufficient to protect Consolidation's interests. *See* Appx. B.

Agreeing with Consolidation's opposition to Petitioner's Motion to Vacate, Judge Bloch ordered that the requested lifting of the stay would only be granted if

Petitioner agreed to enter into stipulations which the district court deemed would adequately protect Consolidation's interest in the present action. Pet. a8. On January 30, 1991, Petitioner acceded to the district court's condition and stipulated, *inter alia*, as follows:

> 1. The Claimants[1] waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding.
>
> 2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.

Pet. a50. On February 1, 1991, the district court lifted the stay that it had imposed on July 20 of the previous year, allowing Petitioner to pursue his Jones Act and unseaworthiness claims in state court. However, Petitioner was prevented from entering or enforcing judgment in the state court action in view of the pending action for exoneration from or limitation of liability.
Pet. a10.

In November 1991, the state court action proceeded to trial and resulted in a jury verdict in favor of Petitioner in the amount of $1,327,000. The jury found that Consolidation was negligent under the Jones Act and that the

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[1] Originally, Petitioner's spouse had asserted claims in both the present proceeding and the state court action. Said claims have since been withdrawn.

vessel in question was unseaworthy. *See* Pet. a31. At the same time, the jury found that Petitioner was 11.83 percent contributorily negligent. After both parties' cross-motions for post-trial relief were denied, the trial court entered an order molding the jury verdict to a damage award in favor of Petitioner in the amount of $1,244,519.50.

Both parties took cross-appeals to the Pennsylvania Superior Court where the Superior Court affirmed all appealed issues except the trial court's award of prejudgment interest in favor of Petitioner. After the parties were denied cross-applications for reargument before the Superior Court, Cross-Petitions for allowance of appeal to the Pennsylvania Supreme Court were also denied. Petitioner petitioned this Court for Writ of Certiorari on the issues of prejudgment interest and contributory negligence at No. 95-240, which Petition was denied on October 10, 1995.

On June 15, 1995 Petitioner moved to have the present action returned to active status in the district court so that Consolidation's claims for exoneration from or limitation of liability may be litigated. He then filed a Motion to Adopt the Findings of the Jury as the Findings of the Court (Pet. a26) and Brief in Support urging that the district court adopt what he perceives to be the findings of the jury from the state court action. Consolidation filed a response opposing said Motion (Pet. a20, entry 45), and on August 4, 1995, Judge Bloch issued an order denying the Motion (Pet. a4).

On or about September 2, 1995 Petitioner filed with the Third Circuit Court of Appeals a Petition for Writ of Mandamus, docketed at No. 95-3479, and what he claims was a protective appeal with that same court on September

1, 1995, docketed at No. 95-3491, each challenging Judge Bloch's refusal to adopt the jury findings in the state court action as binding determinations in the limitation case. In so doing, Petitioner urged the Third Circuit to direct Judge Bloch to act in contravention of conditions to which Petitioner specifically stipulated and in disregard of established admiralty practice. The Third Circuit denied Petitioner's Petition for Writ of Mandamus for failure of "Petitioner to show a clear and indisputable right to the Writ[,]" and dismissed his appeal for lack of jurisdiction, on November 29, 1995. *See* Pet. p. a1-a2. Petitioner's Petition for Rehearing before that same court was denied on December 27, 1995.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Should Be Denied Because it Requires Rulings on the Merits of this Case Which Are Committed to the Province of the District Judge as Fact Finder, Repudiation of Prior Rulings of the Court, and a Matter That Was Discretionary on the Part of the Third Circuit Court of Appeals.

With his Petition, Petitioner seeks to have Judge Bloch required to grant Petitioner's Motion to Adopt the Findings of the Jury as the Findings of the Court (Pet. a26). Such a ruling, according to Petitioner, would result in Judge Bloch taking the findings made by the jury in the state court action that Consolidation was negligent and that the leaving line in question or the vessel on which Petitioner worked was unseaworthy, as binding determinations of fact in the limitation action for the proposition that Consolidation had privity or knowledge of the condition giving rise to Petitioner's injury and that Consolidation "unreasonably failed to inspect the rope[.]" *See* Pet. a28, ¶ 6; a29, ¶ 18. With Judge Bloch's refusal to do so and the Third Circuit's refusal to direct otherwise, Petitioner maintains that further progression of the district court proceeding will result in a reexamination of the jury's findings in the state court action and a denial of a jury trial in this suit, both purportedly in violation of the Seventh Amendment to the United States Constitution.

In making his claims in this regard, Petitioner argues the merits of the exoneration and limitation proceeding[2] and in effect, presents his Motion to Adopt the Findings of the Jury as the Findings of the Court, initially presented to Judge Bloch, as if this Court is to decide the issue *de novo*. In fact, with a Petition for Writ of Mandamus, the Appeals Court is to review the action of the district court judge to whom the requested writ is to be directed. On certiorari, if granted, this Court is to review the decision of the Third Circuit Court of Appeals. In addition, in his Petition to this Court, Petitioner seeks to have firmly entrenched authority of this Court as set forth in cases of *Langnes v. Green*, 282 U.S. 531 (1931) and *Ex Parte Green*, 286 U.S. 437 (1932) "reexamined . . . and overruled." Pet. 19.

The Writ of Mandamus has been used only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402 (1976). In requesting that this Court instruct the Third Circuit Court of Appeals to grant his Petition for Writ of Mandamus and thereby require Judge Bloch to grant Petitioner's Motion to Adopt the Findings of the Jury as the Findings of the Court, Petitioner is seeking to impose a

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[2] *See e.g.*, Pet. 22 n.3, 27, 28. Petitioner's Motion to Adopt the Findings of the Jury as the Findings of the Court which serves as the basis for his Petition for Writ of Mandamus expressly states this. *See* Pet. a28 ("Consol's privity and knowledge, actual or constructive, have been found as facts by the jury at Consol's own request."); a29 ("The jury's finding that Consol unreasonably failed to inspect the rope involved precludes a contrary finding. Therefore, that fact is established for the purposes of this case.")

decision on the factual merits of the limitation proceedings. Such request is clearly beyond the appropriate use of mandamus.

Moreover, a showing of error on the part of the district court is not sufficient to justify the issuance of Writ of Mandamus. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Petitioner not only claims error on the part of Judge Bloch, but also challenges the previous authority of this Court, on which Petitioner admits Judge Bloch's decision was based. Based on this contention, there is no challenge to Judge Bloch's "prescribed jurisdiction" or "exercise . . . [of] authority" in denying Petitioner's Motion. *Kerr*, 426 at 402. Indeed, the relief sought by Petitioner is not just a declaration of error on the part of Judge Bloch, which in and of itself, is insufficient grounds for the issuance of a Writ of Mandamus, *Allied Chemical*, 449 at 35; It is the outright overturning of previous authority of this Court. Such a request cannot be satisfied through the issuance of a Writ of Mandamus.

Finally, notwithstanding the potential existence of the elements necessary for the issuance of a Writ of Mandamus, whether or not to issue the Writ was committed to the sound discretion of the Third Circuit Court of Appeals. *La Buy v. Howes Leather Company*, 352 U.S. 249, 260 (1957); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 n. 8 (1964).

Because Petitioner's Petition for Certiorari involved rulings on the merits in the instant proceeding, which are committed to the authority of the district judge, because Petitioners sought relief asks for this Court to repudiate its prior rulings, and because the issuance of the Writ of Mandamus was discretionary on the part of the Third Circuit

Court of Appeals in the first instance, the Petition should be denied.

II. The Third Circuit Court of Appeals Did Not Err In Denying Petitioner's Petition for Writ of Mandamus.

A. Petitioner cannot satisfy the extremely stringent standard for the issuance of Writ of Manamus.

It is well-settled that a writ of mandamus is reserved for the most extraordinary situations and the use of this "drastic" remedy is carefully circumscribed. *Allied Chemical,* 449 U.S. at 34. An essential condition for the granting of such a relief exists where the petitioner's right to the issuance of a writ is "clear and indisputable." *Will v. United States*, 389 U.S. 90, 96 (1967). While this Court has held that the right to a jury trial where equitable claims are asserted simultaneously with legal claims may justify a writ of mandamus, *see Beacon Theater, Inc. v. Westover*, 359 U.S. 500 (1959), appellate courts have repeatedly held that the "clear and indisputable" criterion is still essential to the granting of a petition for writ of mandamus where denial of the right to a jury trial is asserted. *See Traveler's Int'l A.G. v. Robinson*, 982 F.2d 96, (3d. Cir. 1992); *see also, In Re: Pasquariello*, 16 F.3d 525 (3d Cir. 1994). Moreover, where there exists ambiguity as to whether the petitioner is entitled to a jury trial, and such ambiguity must be resolved in favor of the petitioner to award the request for relief, the Third Circuit has held that the petitioner has not shown a clear and indisputable right and therefore a writ of mandamus should not issue. *Pasquariello*, 16 F.3d at 531. Even where a claim for the writ of mandamus is colorable, it is within the

discretion of the Appeals Court to determine whether the writ should issue. *Kerr*, 426 U.S. at 403.

As set forth below, there is entirely no legal basis supporting Petitioner's claim that the Third Circuit should have issued a writ of mandamus directed to Judge Bloch. However, irrespective of whether this Court should conclude that Petitioner's arguments are meritorious, which is denied, there can be no conclusion that in view of the following that Petitioner's right to the relief that he seeks is "clear and indisputable." Accordingly, the Petition should be denied.

B. Petitioner is bound by his Stipulation that all issues relevant to exoneration or limitation would be litigated in this action.

Petitioner expressly stipulated that the district court would have exclusive jurisdiction for determining all issues related to Consolidation's Complaint for Exoneration From or Limitation of Liability and that no fact found by a jury in the state court action would serve as *res judicata* in the present case. Pet. a50. Apparently mindful of the stipulation that he entered into, Petitioner attempted to circumvent the conditions therein by denominating his Motion presented to Judge Bloch as to one to "Adopt the Findings of the Jury as the Findings of the Court." However, Petitioner's use of this specious terminology in order to assert *res judicata* was recognized by Judge Bloch as being patently transparent and in complete contravention of the stipulation.

Petitioner seeks to cavalierly jettison his stipulation on which Judge Bloch and Consolidation relied in allowing and

agreeing to have the state court action proceed. The stipulation arises from established admiralty practice and cannot be so lightly regarded. First, that the district court, as a federal court sitting in admiralty in an exoneration/ limitation action, has jurisdiction in the present action cannot be gainsaid. It is not coincidence or serendipity which creates jurisdiction in the district court. Instead, it is the fact that Consolidation filed a Complaint for Exoneration from or Limitation of Liability which can be filed only in a federal court and can be heard only pursuant to said court's admiralty jurisdiction. *See Langnes*, 282 U.S. at 540. Appeals courts have consistently held that such in proceedings "the district court, sitting in admiralty without a jury, determines 'whether there was negligence; if there was negligence, whether it was without privity or knowledge of the owner; and if limitation is granted, how the [limitation] fund should be distributed.'" *Gorman v. Cerasia,* 2 F.3d 519, 524 (3d Cir. 1993), *quoting In re* Complaint of *Dammers & Vanderheide & Sheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988) (emphasis added).

Petitioner's stipulation was required by well-established admiralty practice and not the result of a mere whim of the parties. Specifically, courts sitting in admiralty had historically struggled with reconciling the interests underlying such claims as Jones Act negligence which, by statute, may be tried before a jury, and protecting the interests of the vessel owner who has filed a complaint for exoneration from or limitation of liability. *See Gorman* 2 F.3d at 523-24 (3d Cir. 1993). Indeed, in the latter situation, "[t]he court's primary concern is to protect the shipowner's absolute right to claim the [Limitation] Act's liability cap and to reserve the adjudication of that right in the federal forum." *Magnolia Marine Transport Company,*

Inc. v. LaPlace Towing Corp., 964 F.2d 1571, 1575 (5th Cir. 1992) *citing Langnes*, 282 U.S. at 543.

In order to reconcile the conflicts in the interests between a party's right to pursue his claims in the forum of his choice pursuant to this "saving to suitors" clause of 28 U.S.C. § 1333 which preserves the right to a trial by jury for certain claims, as against the admiralty court's exclusive jurisdiction over exoneration and limitation claims and responsibility of insuring the vessel owner's protection under that statute, courts, beginning with this Court, have ruled that in cases such as the present action,

> when a single claimant brings an action against each shipowner seeking damages in excess of the value of the vessel [, . . .] the district court must lift this stay provided that the claimant stipulates that the admiralty court has exclusive jurisdiction to determine all issues concerning the owner's limitation of liability under the [Limitation] Act.

Gorman, 2 F.3d at 524, *citing, inter alia*, *Ex Parte Green*, 286 U.S. at 438-40 (1932) and *Langnes*, 282 at 540-44.

In implementing these procedures admiralty courts for the past 60 years have developed--and required claimants to enter into--stipulations which protect the vessel owner's rights and thus permit the admiralty court to lift the stay created with the limitation proceeding. Such stipulations include the waiver of any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court, and concession of the shipowner's right to litigate all issues relating to limitation in the federal

limitation proceeding. *Gorman*, 2 F.3d at 524-25 citing Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 10-19, at 871 (2d ed. 1975).

The stipulation on which Petitioner now seeks to renege was entered into voluntarily and arose effectively at his request. Specifically, Petitioner sought to have the July 20, 1990 injunction imposed by the district court lifted so that he could pursue the state court action. (Pet. a46). The district court was, at that point, duty-bound to effectuate its "primary concern" of preserving Consolidation's right to the incidents of the Limitation Act. *See Magnolia Marine*, 964 F.2d at 1575. Failure of the district court to impose sufficiently restrictive conditions preserving Consolidation's rights would have constituted an abuse of discretion. *See Gorman*, 2 F.3d at 523. At the same time, had Petitioner not entered into a stipulation sufficient to protect Consolidation's rights, the district court would have been bound to continue enjoining the state court action and try the entire case without a jury. *See, Ex Parte Green*, 286 U.S. at 440; *see also, Complaint of Port Arthur Towing*, 42 F.3d at 316-317.

Accordingly, in order to pursue his state court action, admiralty practice required Petitioner to agree to have disregarded the findings of the jury in the state court action for purposes of the issues in the present case. While Petitioner bemoans the fact the issues of the present action must be litigated *ab initio*, he stipulated to this result and undoubtedly recognized the consequences of his request to have the stay in this case lifted. As noted by the Fifth Circuit Court of Appeals:

> So where, as here, all of the claimants are so anxious to take advantage of the perceived magnanimity of South Texas [state court] juries that they are willing to stipulate essentially that they will submit to two trials -- the state court trial followed by a substantially redundant federal limitation proceeding -- this court is hard put to deny them. We must accede to this choice if it is accompanied by stipulations fully protecting Odeco's [the vessels owner's] right to limit liability and agreeing to abide by an admiralty court determination of the right to limit.

Odeco Oil & Gas Company v. Bonnette, 4 F.3d 401, 404-405 (5th Cir. 1993) (emphasis added in part).

The established procedure with regard to exoneration or limitation proceedings and related state court actions recognizes the potential for identical issues to be raised in both forums and seeks to insure that, to the extent those questions are addressed in any state court proceeding, the complainant in the exoneration or limitation action has the express right to litigate the relevant issues raised in the admiralty court. The Third Circuit Court of Appeals recently reaffirmed this notion:

> We agree with these courts that the potential overlap between the factual questions raised in the limitation proceeding (whether the maritime mishap occurred "without privity or knowledge" of the shipowner) and those to be litigated in the state tort action (whether the shipowner acted unreasonably) requires that a

> claimant seeking to vacate the stay concede both the district court's exclusive jurisdiction to decide all limitation issues and expressly agree to waive any "claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court." [Gilmore & Black, *The Law of Admiralty*, § 10-19, at 871.] It is clear that the relevant waiver discussed is that of issue preclusion, notwithstanding the reference in the cases to "*res judicata*".

Gorman, 2 F.3d at 528-29.

Petitioner devoted considerable discussion in his arguments to the district court and Third Circuit, and does so now in his Petition, to his contention that the factual findings of the jury in the state court action preclude any success in the limitation proceeding and suggests that should the district court not be required to adopt those jury findings as its own, then any factual findings of the district court in the limitation action, presumably in favor of Consolidation, would be inconsistent with that of the state court jury, and therefore prohibited by the Seventh Amendment to the United States Constitution. In this regard, Petitioner is incorrect both legally and factually in his contentions. First, notwithstanding his stipulation that any factual finding in the state court action would not serve as *res judicata* in the limitation case, and that Consolidation retained all rights to have the district court decide issues in the limitation proceeding (*see* Pet. a50), the factual findings of a jury may, under no circumstances, be utilized by an admiralty court in an exoneration and limitation proceeding.

Although Petitioner urges contrariwise, the cases that he cites in support involve either maintenance and cure claims appended to other maritime claims which may be heard by a jury, or single cases in which equitable and legal issues are raised; in all such cases the court had the jury and non-jury issues before it. *See* Pet. 16, 19. Significantly, Petitioner cites no authority in which the factual findings of a jury in a state court action were utilized in determining relevant factual issues in an exoneration or limitation proceeding. Indeed, "[t]here is no right to a jury in actions instituted in admiralty[.]" *Dammers & Vanderheide,* 836 F.2d at 754, *citing Waring v. Clarke*, 46 U.S. (5 How.) 441, 458-60 (1847).

Controlling rules of admiralty law are left primarily for the United States Supreme Court. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963). In the development of those rules with regard to exoneration and limitation proceedings, this Court has not authorized the application of jury findings in an exoneration or limitation proceeding. Accordingly, the district court should not be required to utilize the factual findings of the jury in the state court action with regard to the present case.

C. Jury findings may not be used in resolving limitation or exoneration issues.

1. Limitation of Liability.

Under the guise of claiming denial of a jury trial, Petitioner seeks to have the findings of negligence and unseaworthiness made by the jury in the state court action adopted by the District Court which Petitioner claims would

be dispositive of the "privity or knowledge" issue in the limitation proceeding. *See* Pet. a26. With regard to the limitation aspect of the present action, the findings of the jury in the state court action have no bearing on the determination of whether Consolidation had "privity or knowledge" of the condition giving rise to Petitioner's injuries. As noted in the special interrogatories returned by the jury in the state court proceeding (Pet. a31), Consolidation was found to be negligent under the Jones Act and was found to have provided an unseaworthy vessel or vessels which proximately caused Petitioner's injuries. Such findings, however, are prerequisites to the focal issue in a limitation action; *i.e.*, whether a managing officer of the vessel owner had privity or knowledge of the condition which caused the claimant's injuries. *See Coryell v. Phipps*, 317 U.S. 406, 410-412 (1943). In fact, no such finding was made by the jury in the state court action.

Petitioner's argument that Consolidation should be bound in the limitation proceeding by the finding of the jury because it submitted issues with regard to its knowledge to the jury is *non sequitur*. First, a vessel owner's knowledge for purposes of a determination of Jones Act negligence, as contrasted with privity or knowledge of managing officers of the vessel owner for purposes of limitation of liability, are two completely separate determinations, the latter of which to be made only by the admiralty court in the limitation case. While Petitioner contends that the finding of negligence in a state court action automatically translates to privity or

knowledge with regard to the limitation proceeding, such is not the case.[3]

Assuming, *arguendo*, that the factual findings of the district court may potentially conflict with those of the jury in the state court action, the district court should nevertheless be permitted to undertake its own review of the evidence presented in this case. By way of example, in the Ninth Circuit decision in *Port of Pasco v. Pacific Inland Navigation Company*, 324 F.2d 593 (9th Cir. 1963), following an explosion which damaged the dock of the claimant, the claimant initiated an action in state court in the State of Washington. Thereafter, the owner of the vessel on which the explosion occurred filed an action for limitation of liability in the United States District Court for the Eastern District of Washington. As in the present action, the parties

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[3] In support of his position, Petitioner cites *Gorman v. Cerasia*, for the proposition that "the factual findings of the state court jury would apply in the ensuing limitation case in federal court...." Pet. p.25. In fact, the Third Circuit did not state that the issue of privity or knowledge should not be litigated in the admiralty court and decided *de novo* therein.

The existence of Jones Act negligence and whether the vessel owner had privity or knowledge of the condition which caused Petitioner's injuries are two completely different issues. Most importantly, the Third Circuit's comment was made in an action involving a small pleasure craft owned and operated by the same individual, and was based on the holding in *In Re M/V Sunshine II*, 808 F.2d 762, 765 (11th Cir. 1987) which involved a similar situation--a situation not present here with an industrial barge and tugboat owned by a large corporation with many layers of employees, supervisors and managers. The alleged negligence of one or more of these classifications of employees for purposes of limitations privity or knowledge can not be equated with the acts of an owner/operator of a pleasure craft.

stipulated that the stay issued by the admiralty court with regard to the state court action would be lifted, and the claimant could pursue the state court action; however, the parties reserved to the admiralty court the right to adjudicate the complainant's right to limit its liability.

In the state court proceeding, the Superior Court of the State of Washington found that the management of the defendant vessel owner was negligent and knew or should have known of the conditions and omissions which caused the explosion. *Id.* at 596-97 U.S.

Despite this specific finding implicating the privity or knowledge of the complainant vessel owner, the admiralty court, affirmed by the Ninth Circuit Court of Appeals, found in direct contravention of the holding of the state court, thus permitting the vessel owner to limit its liability. The Ninth Circuit Court of Appeals countenanced this inconsistency based on admiralty practice and the role of the admiralty court in the limitation proceeding:

> [T]he question of limitation of liability was reserved for determination by the district court. It follows that the latter court was free to make its own findings and conclusions with regard to whether supervisory personnel were negligent in such manner as to constitute privity and knowledge within the meaning of § 183(a). If this freedom of action left to the district court means anything, it means that the district court was at liberty to make findings and conclusions which might be expressly or implicitly inconsistent with those made by the state court as a basis for the latter's decision on liability.

Id. at 598 (emphasis added). While the parties had stipulated that the finding of the state court would be binding upon them for purposes of liability and damages,[4] the Court held that such a stipulation did not extend to the limitation proceeding. *Id.* at 599.

Petitioner contends that any finding of fact made by the admiralty court in the present action inconsistent with a finding by the jury in the state court proceeding would contravene the Seventh Amendment to the United States Constitution. However, to the extent inconsistent findings would result (which is not necessarily the case) they would be found in the context of separate issues, *i.e.*, negligence/ unseaworthiness versus privity or knowledge of a vessel owner. More importantly, Petitioner expressly stipulated that the admiralty court would have exclusive jurisdiction to determine the issues relating to exoneration from or limitation of liability in this case irrespective of the factual findings in the state court proceeding. *See* Pet. a50. As noted in the *Port of Pasco* decision, inconsistencies in a state court and admiralty action are inherent in the admiralty procedure providing for a state court action to go forward independently of the limitation proceeding. *See Port of Pasco*, 324 F.2d at 599; *see also*, *Complaint of Great Lakes Dredge & Dock Company*, 1995 WL318807 (N.D.Ill.) *4. ("The potential for non-uniform results arising from separate proceedings is an inherent part of admiralty practice and is specifically contemplated under the Limitation Act.")

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[4] A similar stipulation was not made in the present action.

2. Exoneration from Liability.

The foregoing considerations are significant not only for the limitation component of this action, but also by virtue of the fact that Consolidation, in the present action, has claimed the right to exonerate itself completely from liability, as well as its right to limit its liability to the value of the vessels involved in the Petitioner's accident. As such, Consolidation may litigate not only whether it had privity or knowledge of the condition which caused Petitioner's injuries, but also whether it has any liability for Petitioner's injuries:

> [I]n a suit seeking exoneration from, and alternatively limitation of, liability under the Act, the limitation court must initially address exoneration from liability inasmuch as, in the event no liability is found, there is nothing to limit.

In Re Matter of Texaco, Inc., 847 F.Supp. 457, 459 (E.D.La. 1994), *rev'd on other grounds*, *Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995).

In *Texaco, Inc. v. Williams*, the United States District Court for the Eastern District of Louisiana denied the claimants' motion to have the stay imposed on their state court damage claims despite the claimants' proffered stipulation to have issues regarding limitation of liability litigated in the admiralty court on the basis that the vessel owner had sought both exoneration from and limitation of liability in that court. In recognizing the denial of the claimants' right to jury trials in those state court actions, the district court noted the preference that must be given to the vessel owner in the

exoneration and limitation action and that stipulations providing that the admiralty court could litigate issues with regard to limitation were insufficient to adequately protect the vessel owner's interests. *See generally, In Re Matter of Texaco , Inc.*, 847 F.Supp. at 459-462. Although the district court was reversed on appeal, the Fifth Circuit did so only after the claimants had stipulated that the admiralty court would not be "bound by any decisions by other courts on issues relating to limitation and exoneration." *Texaco, Inc.*, 47 F.3d at 769 (emphasis in original).

Similar considerations underlie the Petitioner's stipulation in the present action. While Petitioner initially offered to stipulate that the admiralty court would have "exclusive jurisdiction of any and all issues relating to Consolidation's attempt to limit its liability . . . [and] that no state court judgment will be *res judicata* as to any limitation fact or issue in the limitation proceeding[,]" (Pet. a46-a47, ¶ 8) (emphasis added), Consolidation opposed the Petitioner's Motion to Lift the Stay on the state court proceeding on the basis that the proffered stipulation inadequately protected Consolidation's interests with regard to its claims for exoneration. *See* Appx. B. pp. 10a-12a. Based on this dispute, the district court ordered that it would lift the stay prohibiting the prosecution of the state court action only if Petitioner stipulated that Consolidation would "have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding[.]" (Pet. a9) (emphasis added).

Three days following the entry of this order, Petitioner acceded to the requirements for the Stay to be lifted, without objection or opposition. Specifically, Petitioner stipulated that "Consolidation Coal Company shall

have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption." (Pet. a50) (emphasis added). Based on this Stipulation, Judge Bloch lifted the Stay and permitted Petitioner to pursue the state court action. (Pet. a10).

Had Petitioner not entered into the forgoing Stipulation, his claims necessarily would have been litigated in the present action. *See Ex Parte Green,* 286 U.S. at 440. By virtue of the Stipulation, however, Consolidation retained its right to litigate all issues with regard to exoneration or limitation, without Petitioner raising any factual issue decided in the state court action as *res judicata* in this case. Again, despite Petitioner's urging this Court to direct that Judge Bloch adopt the findings of the jury in the state court action, the clear effect of this request is to impose *res judicata* and collateral estoppel against Consolidation, both of which Petitioner stipulated not to do, and which settled admiralty practice prohibits.

D. Petitioner waived any rights to having the jury findings employed for any aspect of limitation proceeding.

Assuming, *arguendo*, that violation of Petitioner's Seventh Amendment rights are an issue, by entering into the Stipulation of January 30, 1991, Petitioner waived any protection which would otherwise be afforded by the Seventh Amendment. It is well established that constitutional rights may be waived if the waiver is voluntary, knowing, and intelligent. *Faretta v. California*, 422 U.S. 806, 835 (1975). Whether the waiver was voluntary, knowing, and intelligent

is to be determined from the facts and circumstances of a particular case. *Edwards v. Arizona*, 451 U.S. 457, 482 (1981). It cannot be doubted that Petitioner's Stipulation of January 30, 1991 constituted a sufficient and binding waiver of any right that he may have had against a court's reexamination of jury findings. Specifically, it was Petitioner who moved in the district court to have the stay of the state court proceeding lifted, and who stipulated that he would waive any claim of *res judicata* in the state court proceeding, and that Consolidation would have the right to litigate "all issues" relating to the limitation and exoneration proceeding.

The issue of the necessity for and content of stipulations required for the admiralty court to lift the stay on the state court action was specifically presented and disputed in detail before the district court, prior to Petitioner entering into the Stipulation. *See* Pet. a46, Appx. B, Pet. a8, a50 and a10. Significantly, Petitioner never raised any Seventh Amendment issue, did not challenge the stipulation that the district court deemed necessary to permit the state court action to proceed, and voluntarily entered into that stipulation.

Had Petitioner felt the stipulation required by the court was objectionable, he certainly should have challenged it then.[5] Significantly, however, Petitioner raised no objection

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[5] Petitioner is obviously well familiar with the opportunities for appealing an interlocutory order--witness Petitioner's appeal to the Third Circuit at Docket No. 92-3734 concerning the district court's November 20, 1992 order prohibiting execution on the judgment in the state court action (Pet. a18, entries "w/35" and 37). In particular, Petitioner is obviously familiar with the mechanism to seek appellate relief for the

at that time. It is only now, after he has been awarded a jury verdict on his claims of unseaworthiness and Jones Act negligence in the state court action that Petitioner seeks to renege on his Stipulation and asks this Court to direct what he was expressly forbidden to do, and what he expressly agreed not to do. Petitioner's assertion of Seventh Amendment issues, after having previously waived them, cannot now be asserted simply because it suits his fancy. *See Carter v. Sea Land Services, Inc.*, 816 F.2d 1018, 1021 (5th Cir. 1987) *citing Schnecktoth v. Bustamonte*, 412 U.S. 218 (1973) ("Once a right, even a fundamental right, is knowingly and voluntarily waived, a party has no constitutional right to recant at will.")[6]

Petitioner appears to equate the district court's intention to preside over a bench trial on all issues relating to Consolidation's Complaint for Exoneration From Or Limitation of Liability as a deprivation of his jury trial rights under the Seventh Amendment to the Constitution. To cure this purported deprivation, Petitioner wishes to have the district court ordered to adopt findings of the jury in the state court action. However, not only is the procedure that the district court intends to follow accepted in admiralty

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purported denial of rights to a jury trial. *See* Petition for Writ of Mandamus and Petitioner's appeal of September 1, 1995 from the district court's August 4, 1995 order.

[6] Similarly, by entering into the January 30, 1990 Stipulation, Petitioner consented to having any jury findings within the state court action which may be relevant in the within proceeding "reexamined". *See Withrow v. Cornwell*, 845 F.Supp. 784, 785 (D.Kansas 1994), *citing Dimick v. Schiedt*, 293 U.S. 474 (1935) (Additur imposed by court, with consent of both parties, does not violate Seventh Amendment proscription on reexamination of jury findings).

practice, but Petitioner expressly agreed to it through his stipulation of February 1, 1991 (Pet. a50). Swiftly backpedaling from his stipulation, Petitioner now states that he did not agree to have the district court make factual findings relevant to issues of exoneration and limitation in the limitation proceeding notwithstanding the fact that they may be inconsistent with findings of the jury in the state court action. Pet. 22-23.

The stipulation could not be more clear. When Petitioner stated that he would "waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding[,]" Pet. a50 (emphasis added), what was Petitioner waiving other than the potential claim that certain facts which may be relevant in the exoneration or limitation proceeding already been adjudicated in the state court action by a jury and were thus binding in the present action?

When Petitioner agreed in his stipulation that Consolidation would "have the right to litigate all issues relating to its claims of limitation or exoneration of liability" in the limitation proceeding (Pet. 29a) (emphasis added), what else was he agreeing to but to be subject to a bench trial on the merits of Consolidation's exoneration and limitation claims? The court, in permitting the state court action to proceed, and Consolidation, in not opposing that ruling, relied on Petitioner's stipulation in these regards.[7] It

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[7] As stated by the district court in its August 4, 1995 order:

> Claimant's attempt to have this Court adopt the state court jury's findings for purposes of the limitation proceeding is directly contrary to his own stipulation. In addition, in light of the stipulation, the claimant

is significant that Judge Bloch--who required the stipulation, presided over the parties' dispute over its wording, and lifted the stay on the state court action, so interprets the effect of the stipulation.

Accordingly, Petitioner's contentions concerning violations of the Seventh Amendment, to the extent any such issues are implicated, have been voluntarily waived.

E. Petitioner is not entitled to a jury trial *de novo* in the limitation proceeding.

Petitioner lastly urges that should this Court not instruct Judge Bloch to adopt the findings of the jury in the state court proceeding, that it nonetheless direct that the district court order a jury trial *de novo*. Petitioner completely disregards the fact that complaints for exoneration from and/or limitation of liability do not give rise to a jury trial. *Gorman*, 2 F.3d at 524; *Dammers & Vanderheide*, 836 F.2d at 755.

Petitioner attempts to contort the limitation proceeding, and thus deprive the incidents that Consolidation is entitled to under it by incorporating a jury into the procedure so as to make factual determinations. As noted previously, there is no such provision in the admiralty

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cannot argue that the complainant waived its right to litigate the limitation issues by proceeding in state court; the complainant undoubtedly relied on the claimant's stipulation when it agreed to litigate in a different forum. [Pet. a7.]

procedure to do such. Significantly, Petitioner cites no authority for a jury to decide factual issues in a limitation proceeding, where as here, the district court did not have an independent jurisdictional basis for the claims of the Petitioner.

Since Consolidation brought this action as a limitation proceeding, Petitioner is not entitled to a jury trial, and therefore, Petitioner's request that this Court order such should be denied.

CONCLUSION

Accepted admiralty practice vindicates Judge Bloch's refusal to adopt the findings of the jury in the state court proceeding for purposes of the issues in this limitation action. Petitioner voluntarily agreed not to do what he is asking this Court to do presently. In reliance on that stipulation, the district court and Consolidation agreed to allow the state court action to proceed. To the extent any rights of Petitioner's will be denied by the limitation action proceeding, Petitioner has expressly waived those rights.

Even if Petitioner's arguments to this Court are accepted, Petitioner has not established a clear and indisputable right to relief. At best there is ambiguity as to whether Petitioner is entitled to invoke the jury findings of the state court proceeding or whether Petitioner is entitled to a jury trial in the present action, which ambiguity precludes the establishment of a clear and indisputable right to have the writ of mandamus issued.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 20, 1990

Civil Action No. 90-1206

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

ORDER

AND NOW, this 20th day of July, 1990, upon consideration of Consolidation Coal Company's ("Consol") Motion for Approval of Limitation Bond and Stipulation for Costs and for an Order Directing Issuance of the Required Notice and for Issuance of an Injunction with respect to any and all losses, damages, or injuries occasioned or incurred by any person or resulting from an alleged accident involving George Newman, which occurred on or about April 27, 1989 while he was employed by Consol, and referred to in Consol's Complaint for Exoneration From or Limitation of Liability filed herein, and it appearing to the Court that (1) the combined value of Consol's interest in the towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending was approximately $120,000.00, (2) the claims which have been or may be asserted against Consol may exceed the value of its interest in said towboat and barge and the freight then pending, and (3) Consol filed a Limitation Bond in the amount of $120,000.00 plus interest and has further filed a Stipulation for Costs in the amount of $250.00, IT IS HEREBY ORDERED that the Limitation Bond is approved; however, such

approval is without prejudice to the due appraisal of Consol's interest in said towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending, if so Ordered, and that in the meantime, any party may apply to have the amount of the Limitation Bond increased or diminished as the Court may direct.

IT IS FURTHER HEREBY ORDERED that a notice in the form attached hereto as Exhibit "A" shall issue out of and under the seal of this Court, citing all persons, firms, and corporations who have or allege to have claims for any and all losses, damages, or injuries occasioned or arising out of the alleged accident involving George Newman which occurred on or about April 27, 1989, to file their respective claims with the Clerk of this Court or be forever barred, and to serve copies of said claims on Consol's attorneys, Thomas A. Smock, Esquire and Leonard Fornella, Esquire, on or before September 15, 1990, and to make due proof of their claims as this Court may hereafter direct, subject to the right of any such persons or concerns to controvert or question said claims, with liberty also to such claimants who have duly filed claims to answer the Complaint filed herein by filing an Answer with the Clerk of this Court on or before September 15, 1990.

IT IS FURTHER HEREBY ORDERED that pursuant to Local Admiralty Rule (g)(3), the aforesaid public notice shall be given by publication thereof in the Pittsburgh Press, published in Pittsburgh, Pennsylvania, and that such notice shall be published once a week for four successive weeks prior to the date fixed herein for filing claims.

IT IS FURTHER HEREBY ORDERED that not later than the date of the second publication, Consol shall mail or cause

copies of said notice to be mailed to every person or concern known to have made any claim against them or against the towboat M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident which allegedly occurred on on or about April 27, 1989.

IT IS FURTHER HEREBY ORDERED that the institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the towboat M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

IT IS FURTHER HEREBY ORDERED that service of this Order shall be made by Consol or its designee.

s/ Alan N. Bloch
UNITED STATES DISTRICT JUDGE

APPENDIX B — RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTION AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTION AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

AND NOW comes Complainant, Consolidation Coal Company (hereinafter "Consol") by and through its undersigned counsel, and hereby responds to the motion of Claimants, George Newman and Suzanne M. Newman, to vacate or dissolve injunction and to stay this proceeding, averring as follows:

RESPONSE TO MOTION

1. With respect to the averments contained in paragraph 1 of Claimants' motion, it is admitted that Claimants have filed a Complaint against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania (hereinafter "state court suit"), seeking to recover damages under the Jones Act, 46 U.S.C. Section 688, and also alleging the unseaworthiness of vessels. It is also admitted that Claimants have also filed a formal claim in this proceeding on the same bases. However, it is denied that Claimants have asserted any affirmative claim for recovery

based on negligence under Section 5(b) of the Longshoremen and Harborworker's Compensation Act, 33 U.S.C. 905(b) in their the state court suit, although such a formal claim has ostensibly been made by Claimants in this proceeding.

2. With respect to the averments contained in paragraph 2 of Claimants' motion, it is admitted that Mr. Newman was involved in an accident on or about April 27, 1989 while employed by Consol. The remaining averments contained in paragraph 2 of Claimants' motion are denied as stated.

3. With respect to the averments contained in paragraph 3 of Claimants' motion, it is admitted that Claimants have filed suit against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980, which was served upon Consol on January 26, 1990. Consol is without knowledge or information sufficient to form a belief as to the truth of Claimants' averment as to the date on which said suit was filed, and thus said averment is denied.

4. The averments contained in paragraph 4 of Claimants' motion are denied as stated. On July 20, 1990, Consol filed the instant action seeking both exoneration from or limitation of liability. It is admitted that on July 20, 1990, this Court entered an Order in this action. However, the terms of that Order speak for themselves, and thus no response to required.

5. With respect to the averments contained in paragraph 5 of Claimants' motion, Consol avers that the terms of this Court's Order of July 20, 1990 speak for themselves, and thus no response to Claimants' attempt to paraphrase said Order is required.

Appendix B

6. With respect to the averments contained in paragraph 6 of Claimants' motion, it is admitted that Consol duly and timely published, served and/or filed all advertisements, notices, proofs and other documents or pleadings required by the statutes, orders, rules and/or regulations applicable to this action.

7. The averments contained in paragraph 7 of Claimants' motion are admitted in part and denied in part. It is admitted that no claimants other than the Newmans have filed formal claims in this action. However, it is denied that Mrs. Newman has any legally cognizable claim for derivative consortium rights.

8. Consol avers that no response is required to the averments contained in paragraph 8 of Claimants' motion.

9. Consol avers that no response is required to the averments contained in paragraph 9 of Claimants' motion. In the event a response is deemed to be required, then Consol avers that it will be prejudiced by the granting of this motion if all required stipulations are not made by Claimants. Consol further denies that, if Claimants win a judgment in their state court suit less than the limitation fund, this Court will not be required to take any further action, since Consol's action herein is not only for limitation but also for exoneration from liability, and further action may be necessary on the exoneration claim.

10. Consol avers that no response is required to the averments contained in paragraph 10 of Claimants' motion.

11. The averments contained in paragraph 11 of Claimants' motion are denied as stated.

Appendix B

MEMORANDUM OF LAW IN RESPONSE TO CLAIMANTS' MOTION

Claimants' motion to vacate or dissolve injunction and to stay is actually two motions, and Consol will hereinafter discuss the relative merits of these motions separately.

Claimants filed an action against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980 (state court suit), which was served on Consol on January 26, 1990. Claimants allege in their state court suit that George Newman was a seaman and that he was injured after being involved in an accident on or about April 27, 1989 while employed by Consol.

On July 20, 1990, Consol filed the instant action seeking exoneration from or limitation of liability with respect to Mr. Newman's accident of April 27, 1989, pursuant to the provisions of 46 U.S.C. Sections 181, et seq. At that time, Consol also filed an appropriate Limitation Bond in the amount of $120,000.00, representing the aggregate value of Consol's interests in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Mr. Newman claims to have been working at the time of his accident.

Upon the filing of Consol's Complaint herein, and in order to properly protect this Court's admiralty jurisdiction over this matter, this Court entered an Order on July 20, 1990 which, among other things, ordered on page 3 that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the

> aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

Thus, this Court's Order of July 20, 1990 effectively enjoined any further prosecution of the state court suit which Claimants had filed previously.

Consol subsequently published all required notices and advertisements, and filed all required pleadings and proofs in accordance with the applicable statutes, orders, rules and regulations governing actions for exoneration from or limitation of liability. Thereafter, the only claim filed in this proceeding was one filed on behalf of the Newmans, Claimants herein. Claimants now move this Court to vacate or dissolve the stay of July 20, 1990 so that they may proceed with the prosecution of their state court suit. Claimants have also asked this Court to enter a stay as to all further proceedings in the instant action wherein Consol seeks exoneration from or limitation of liability, pending final resolution of the state court suit.

I. *Claimants' Motion to Vacate or Dissolve Injunction*

In *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931) and in *Ex Parte Green*, 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1932), the Supreme Court announced that when a petition for exoneration from or limitation of liability was pending within the admiralty jurisdiction of a federal court, and where the only claim in the limitation proceeding was filed by a party who had previously filed a suit in a state court, then the federal district court should dissolve its stay or injunction as to the state court proceeding, but *only* if certain requirements were first met.

Appendix B

Subsequent to the *Green* decisions, various federal courts attempted to define precisely the factors which a claimant must first meet before the stay or injunction as to the state court proceeding could be lifted. The result of those decisions was the development of a rule requiring a claimant to file a series of stipulations when seeking to lift a stay. These stipulations were summarized by Professor Gilmore and Black in *The Law of Admiralty*, Second Edition (1975), at pages 871-872, as follows:

> The procedure which has been worked out under the *Green* cases is as follows: a single claim plaintiff who wishes to prosecute a common law action after the shipowner has filed a petition for limitation must
>
> a) file his claim limitation proceedings
>
> b) where a stipulation for value has been filed in lieu of the transfer of the ship to a trustee, concede the sufficiency in amount of the stipulation;
>
> c) consent to waive any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in the state court;
>
> d) concede petitioner shipowners right to litigate all issues relating to limitation in the limitation proceeding.

(Citations omitted). *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp. 609, 611 (M.D. La. 1982); *S & E Shipping Corp. v. Chesapeake and Ohio Railway Company*, 678 F.2d 636, 643 (6th Cir. 1982); *Newton v. Shipman*, 718 F.2d 959, 962 (9th Cir. 1983); *Jefferson Barracks Marine Service v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985); *Valley Line Company v. Ryan*, 771 F.2d 366, 373 (8th Cir. 1985).

All of the courts which have addressed this issue are in uniform agreement that stipulations a), b), and d), above, are absolutely necessary before a stay of other proceedings may be lifted. Admittedly, however, there is a question as to the necessity of requirement b), that being that a claimant concede the sufficiency of the amount placed in the limitation fund. The split of authority with regard to this factor will be discussed more fully below, after Consol discusses whether the stipulations which have been made by Claimants herein at least satisfy the other three requirements.

Requirement (a) — File a Claim in the Limitation Proceeding

Consol concedes that Claimants have filed a formal claim in this action with respect to Consol's Complaint seeking exoneration from or limitation of liability, and therefore Claimants have met this requirement.

Requirement (c) — Consent to Waive any Claim of Res Judicata Relevant to the Issue of Limited Liability Based on any Judgment Obtained in the State Court

In paragraph 8 of their motion, Claimants and their counsel have agreed to "stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation

proceeding." Although this stipulation may seem to satisfy the required res judicata waiver on first blush, Consol submits that a closer reading suggests that the stipulation, as worded, does not satisfy the requirement.

In the above regard, Claimant's stipulation only concedes that no state court judgment will be asserted as res judicata as to any "limitation fact or issue" in the limitation proceeding. However, the applicable decisions on this issue generally require that a claimant stipulate that "*no res judicata arguments* will be made based upon any state court judgment." *Complaint of Midland Enterprises, Inc.*, 886 F.2d 812, 814 (6th Cir. 1989) (emphasis added). *See also, In Re Red Star Barge Line, Inc.*, 160 F.2d 436, 438 (2d Cir. 1947) where the court required the claimant to waive any claim of res judicata relevant to the issue of limited liability and based on any judgment obtained in the state court action.

Consol is not uncertain as to what Claimants mean or intend when they limit their res judicata waiver to any "limitation fact or issue." While not intending to engage in semantical gymnastics, Consol nevertheless would suggest that Claimants' attempt to restrict their stipulation regarding res judicata only to "limitation facts or issues" is too narrow in the face of the decisional authorities which require a waiver of *any* claim of res judicata with respect to *any* issue relevant to the proceeding. Furthermore, Consol has sought both an exoneration from or a limitation of its liability in this action. To the extent Claimants' stipulation only applies to "limitation facts or issues", but not to issues relative to exoneration, then it does not properly protect this Court's admiralty jurisdiction over all issues in this proceeding.

Thus, to the extent that Claimants' stipulation is an attempt to waive res judicata, but only as to *certain* issues which may arise in this proceeding, then the stipulation is unduly narrow, and does not comport with the required language necessary to lift the stay as to Claimants' state court suit.

Requirement (d) — Concede Consol's Right to Litigate all Issues Relating to Limitation in the Limitation Proceeding

Claimants have stipulated in paragraph 8 of their motion that this Court "has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman' a aforesaid injuries. Generally speaking, this stipulation would appear to satisfy the requirement necessary to protect this Court's admiralty jurisdiction to decide any and all issues in this proceeding. However, the stipulation does not specifically concede that Consol will have the continuing *right* to litigate any and all issues relative to this proceeding; but merely that this Court will have sole and exclusive jurisdiction over those issues. Additionally, the stipulation does not recognize that Consol seeks herein both an exoneration from or a limitation of its liability. If this Court were to formally and affirmatively interpret Claimants' stipulation as conceding that Consol will continue to have the *right*, following the lifting of the stay, to litigate any and all issues relative to exoneration or limitation solely and exclusively within this Court, then this particular requirement could be satisfied.

Requirement (b) — Concede the Sufficiency in Amount of the Stipulation

Commensurate with the filing of its Complaint herein, Consol filed an Affidavit of Value and a Limitation Bond securing the value of the M/V Elizabeth and Barge No. MC 1029

as an alternative to tendering the vessels themselves. The limitation fund as to those vessels has been offered at the combined aggregate value of $120,000.00. Part (b) of the generally quoted four part test set forth in Gilmore and Black, above, would therefore require Claimants herein to concede that the $120,000.00 value of the vessels in the limitation fund is sufficient and proper. Claimants have not made any such stipulation or concession in their motion.

Consol candidly admits, however, that various district and circuit courts are split in their determination of whether this concession is absolutely required before a stay of a state court action may be lifted. In that regard, certain courts addressing this issue have cited generally the four part test set forth in *Gilmore and Black* as being required in its entirety. *See e.g., S & E Shipping Corp. v. Chesapeake and Ohio Railway Company, supra; Jefferson Barracks Marine Service v. Casey, supra; Valley Line Company v. Ryan, supra; and In Re Red Star Barge Line, Inc., supra.* More specifically, in *Complaint of Tropigas Carriers, Inc.*, 603 F. Supp. 940 (S.D. Fla. 1985), the district court, when lifting its stay, specifically ordered the claimant to file a statement conceding the sufficiency and amount of the stipulation for value filed by the shipowner in the limitation action. Thus, a literal reading of the above decisions would indicate that Claimants' stipulation herein lacks the necessary concession regarding the sufficiency of the value of the limitation fund herein, and would therefore not support their request to lift the stay.

On the other hand, there are number of decisions which discuss in depth this particular requirement, and have rejected the reasoning that a claimant must stipulate to the value of the limitation fund before a stay may be lifted. *See, e.g, Complaint*

of Midland Enterprises, Inc., supra.; *In Re Mr. Wayne*, 729 F.Supp 1124 (E.D. La. 1989); *Kattelman v. Otis Engineering Corp.*, 701 F.Supp. 560 (E.D. La. 1988); *Complaint of North Lubec Manufacturing and Canning Company*, 647 F.Supp. 1132 (D. Me. 1986).

However, it is important to not that even in those decisions holding that a claimant need not stipulate to the value of the limitation fund, nevertheless, those courts have generally required that the other stipulations which the claimant did make include a concession, generally or specifically, that the valuation issue remained exclusively an admiralty question and was reserved for determination by the federal court in the limitation proceeding. *See, e.g., Complaint of Midland Enterprises, Inc., supra.* at 817, where the court accepted the claimant's contention that she need not stipulate to the value of the limitation fund itself, but must concede the exclusive right of the district court to determine value. *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp 609, 612 (M.D. La. 1982) ("the determination of the amount of the fund to which [liability] will be limited are hereby specifically reserved to this Court"); *Complaint of Cannon*, 487 F.Supp 26, 28 (S.D. Fla. 1980) ("the value of the vessel can be finally determined when, and if, this Court is presented with the limitation of liability issue").

In the instant action, Claimants have not conceded the sufficiency of the value of the limitation fund offered by Consol. Therefore, if this Court accepts the reasoning of those decisions which require Claimant to specifically make such a concession before the stay will be lifted, then obviously Claimants herein have not complied with their requirement and the stay cannot be lifted.

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Alternatively, in the event this Court should, after review of the applicable authorities, favor the reasoning of those decisions which have not required a stipulation as to the value of the limitation fund before lifting the stay, then Claimants herein must nevertheless concede, in the stipulations which they do make, that the exclusive right to determine the sufficient and proper value of the limitations fund lies exclusively with this Court.[1] Claimants herein have not specifically conceded that any and all issues regarding the proper valuation of the limitation fund or of the the M/V Elizabeth and Barge No. MC 1029 are reserved exclusively for determination by this Court has sole and exclusive jurisdiction over any and all issues relating to Consol's attempt to limit its liability. If this Court were to formally and affirmatively construe that stipulation in broad fashion so as to include a concession by Claimants that all valuation issues are also reserved for exclusive determination by this Court, the proferred stipulation may be sufficient.

Response to Claimants' Third Stipulation

The third stipulation which Claimants and their counsel make in paragraph 8 of their motion is that they "stipulate that they will confine the Newmans' action to the case pending in the

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1. As this Honorable Court may recall, Claimants herein previously challenged the value of the limitation fund insofar as the number of vessels to be included was concerned. A hearing on Claimants' motion in that regard was held before this Court on December 21, 1990, after which Claimants' motion to increase the value of the fund by including the values of other barges in Consol's empty fleet was denied. However, it is to be noted that under Rule F(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Claimants may still challenge the aggregate $120,000.00 value which has been placed on the M/V Elizabeth and Barge No. MC 1029, by requesting an appraisal of those two vessels.

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Court of Common Pleas of Allegheny County, Pennsylvania. Consol is currently not certain as to the exact meaning or intent of this particular stipulation, since, on its face, it does not appear to relate to any of the stipulations required by the authorities discussed above. However, if this stipulation is an offer by Claimants that they will not institute or pursue any other proceedings against Consol in any other court or forum, then the offer would be proper, since this Court's stay should only be lifted, if at all, to allow Claimants to pursue their previously filed state court suit, but not to allow for the filing of or processing of any other claims or actions.

On the other hand, in the event this stipulation is an attempt to suggest that Claimants are only agreeing to proceed with their state court suit, but are contesting whether they have any further obligation to continue to proceed in the instant exoneration or limitation of liability action, then Consol would suggest that this stipulation is an improper attempt to restrict or confine these proceedings. As the Court will note from a review of the various decisions discussed above, the lifting of this Court's stay against Claimants' state court suit does not in any manner act as a dismissal of the instant action or otherwise moot this action. This exoneration from or limitation of liability action will still remain viable and must eventually be resolved and decided.

Even if This Court Should Vacate or Dissolve its Stay, It Should Only do so in Limited Fashion

In the event this Court should decide, upon proper stipulation from Claimants, that the stay as to Claimants' state court suit should be vacated, dissolved or lifted, the blanket stay may not be lifted in ita entirety. In that regard, the stay Order of July 20, 1990 applies to any and all suits, actions or legal

proceedings against Consol or the involved vessels arising out of or connected with Mr. Newman's alleged accident of April 27, 1989. This Court's authority to lift its stay only extends to allowing a single claim Claimant to pursue a previously filed state court action involving the same incident. It does not, however, allow for the lifting of the stay in order to permit the filing or processing of any other claims by a claimant or any other person. Therefore, in the event this Court should decide to lift its stay herein, its Order should be crafted *only* for the limited purpose of allowing Claimants' state court suit to proceed.

Secondly, even as to the lifting of the stay to allow Claimants' state court suit to proceed, this Court should allow the stay to continue in effect against the entry of any judgment against Consol in Claimants' state court suit, and as to any consequent enforcement of any such judgment, pending the outcome of this proceeding for exoneration from or limitation of liability. *See, e.g., In Re Mr. Wayne, supra*, at 1130, where the court ordered the stay lifted to allow the prosecution of the claimant's state court action, but continued the stay in effect against entry of judgment and consequent enforcement of recovery pending the outcome of the limitation proceeding. *See also, Complaint of Dammers & Vanderheide*, 660 F.Supp. 153, 160 (S.D. N.Y. 1987), *aff'd*, 836 F.2d 750 (2d Cir. 1988). The reason for continuing the stay against the entry and enforcement of any judgment against Consol in the state court suit is to protect this Court's sole and exclusive admiralty jurisdiction over any and all issues relevant to exoneration from or limitation of liability.[2]

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2. This Court may allow the entry of a defense judgment against Claimants and in favor of Consol in the state court suit.

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II. *Claimant's Motion to Stay the Instant Proceeding*

As indicated above, Claimants have not only moved to lift the stay against their pending state court action, but have also moved this Court to stay the instant proceeding until after the termination of their state court suit.

Gilmore and Black suggest, at page 872, that where a federal court lifts its stay as to a state court suit, "the admiralty court dissolves or modifies its Section 185 injunction to allow the civil action to proceed, meanwhile holding the limitation proceeding in abeyance until the result of the civil action is known. Some district courts, when lifting their injunctions against state court actions, have temporarily closed their limitation of liability files, without prejudice, pending a request to re-open following the conclusion of the state court proceeding, or have otherwise held in abeyance any outstanding motions and pretrial matters pending resolution of the state court proceedings. *See, Kattelman v. Otis Engineering, Corp., supra*; *In Re Mr. Wayne, supra; Complaint of Tropigas Carriers, Inc., supra.*

Nevertheless, Consol is not aware of any authority which affirmatively *requires* this Court to stay the instant action if this Court should allow Claimants to proceed in state court. In that regard, it is to be noted that, in *Complaint of Cannon, supra*, at 29, the court lifted its injunction as to the state court proceeding and stayed its own limitation action. However, that court also ordered that, in the interim, the court "may take action on those matters that are not subject to determination by the state court."

Consol would respectfully submit that, ultimately, the decision as to whether to impose a stay on all further proceedings in the instant action rests solely within the discretion of this

Court. The general rule is that the pendency of an action in a state court is no bar to proceedings concerning the same or a similar matter in a federal court having jurisdiction. Nevertheless, many courts follow the rule that a federal district court has discretion to stay proceedings on its own docket pending the outcome of a similar suit instituted in a state court. The Supreme Court recognizes this discretion; however, has indicated that its exercise is justified only in exceptional circumstances. See, discussion at *Federal Procedure, L.Ed.*, Volume 1, Section 1:558. Factors affecting the decision to grant or deny a stay include, among others, the order in which jurisdiction was obtained, the similarities of the parties, the similarity of issues, avoidance of piecemeal litigation and the convenience of the forums. *See generally, Federal Procedure, supra,* at Sections 1:559-1:564.

It is to be noted herein that, while the parties are the same and the issues may appear to be similar on their face, the legal theories and burdens of proof are different in this action as opposed to those in Claimants' state court suit. It should also be noted that, although it is true that in the event Consol is ultimately successful in obtaining a defense verdict in the state court suit, no further action in this proceeding would be necessary; nevertheless, in the event of a jury award in favor of Claimants in state court, the parties would still return to this Court for a determination of whether Consol should be exonerated from and/or limited with respect to its liability. Under these circumstances, this Court may wish to continue with this proceeding presently, rather than waiting to proceed in the future.

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Respectfully submitted,

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